No. 83-1076

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

NATIONAL ENQUIRER, INC.,
Appellant,

v.

CAROL BURNETT,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

---

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

JOHN G. KESTER *
HAROLD UNGAR
Hill Building
Washington, D.C. 20006
(202) 331-3069
Attorneys for Appellant

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1076

NATIONAL ENQUIRER, INC.,
Appellant,

v.

CAROL BURNETT,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Although Appellee tries to raise questions as to whether the procedural requirements for review were complied with, both issues presented in the Jurisdictional Statement were preserved below and are properly before this Court.

I. THE ABSENCE OF ILL WILL HERE WAS CONCEDED.

Appellee's motion attempts to argue that ill will of the publisher should be inferred by this Court as a matter of law. That new position is untenable:

1. Appellee's counsel conceded on the record that no claim was made that Appellant had any hatred or ill will. R.T. 1318.[1] The courts below assumed ill will was absent, holding that "conscious disregard for the rights of others" sufficed instead. R.T. 1335; J.S. 19a-21a.

[1] Citations to "R.T." are to the reporter's transcript, and "C.T." to the Clerk's transcript, from the trial court. "Motion" refers to Appellee's Motion to Dismiss or Affirm filed herein, and "J.S." to Appellant's Jurisdictional Statement.

2. The issue was never put to the jury. Appellant's proposed instruction that ill will must be proven for punitive damages was refused. C.T. 1615; R.T. 1141. The jury was specifically instructed that it could impose punishment based simply on finding "conscious disregard for the rights of others." R.T. 1335.

II. WHETHER PUNITIVE DAMAGES MAY CONSTITUTIONALLY BE AWARDED TO A PUBLIC FIGURE, ABSENT ILL WILL AND DAMAGE TO REPUTATION, IS A QUESTION PROPERLY BEFORE THIS COURT ON APPEAL.

The Motion to Dismiss never even mentions the cases cited in the Jurisdictional Statement that have held punitive damages barred by the First Amendment in a public-figure libel case like this.[2] Nor does it acknowledge the doubts expressed by the American Law Institute.[3] Instead, the Motion argues that this substantial issue of federal constitutional law as to which the lower courts are in conflict should be passed over—even in this appeal within this Court's mandatory jurisdiction—simply because the exact amount of the punitive award is not fixed, Appellee having rejected $150,000 and elected to try for more. But the precedents of this Court amply demonstrate that now is the time for this question to be settled.

1. First, the ordering of a new trial on the limited issue of punishment in no way alters the clear finality of the judgment as to liability. *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963). This case is here on appeal, under 28 U.S.C. § 1257(2). There is no doubt at all that

---

[2] *Sprouse* v. *Clay Communication, Inc.*, 211 S.E.2d 674 (W.Va.), *cert. denied*, 423 U.S. 882 (1975); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556, 570 (La. App. 1980), *cert. denied*, 452 U.S. 941 (1981); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975).

[3] RESTATEMENT (2d), TORTS § 621, comment *d* (1977). See also the doubts expressed by the Second Circuit in *Buckley* v. *Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

the constitutionality under the First and Fourteenth Amendments both of California Civil Code § 48a and of California Civil Code § 3294 was challenged below, *e.g.*, R.T. 1142, C.T. 1752, 1757-58, 1765-66; Brief for Appellant, Court of Appeal, at 43, 48-50, and that the decision below was in favor of their validity. Appellee concedes this. See, *e.g.*, Motion at 26. This case therefore is here on the merits, and this Court's ruling will be a decision on the merits, binding on all other courts, see *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975), as to whether § 48a can constitutionally exclude the *Enquirer* from its protection based solely upon evaluation of the content of four other issues, and also as to whether § 3294, authorizing punitive damages based solely on "conscious disregard for the rights of others," is constitutional as applied in a public-figure libel case where on the record admittedly there was no ill will and no damage to reputation.[4]

2. Controlling on this point are the holdings of this Court in *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974), and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In *Tornillo*, the state supreme court had remanded the entire case (not just, as here, the issue of setting punishment) to the trial court for further proceedings. This Court held that the case was appropriately before it, particularly because "Whichever way we were to decide the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment . . . ." 418 U.S. at 247 n.6. In *Cox Broadcasting*, this Court carefully canvassed its decisions respecting cases brought before it where a state appellate court has mandated further proceedings, noting that "In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other Fed-

---

[4] Even in discretionary certiorari cases this Court grants review where, for example, the issues are clear under the Freedom of Information Act even though no documents have been ordered produced and the appellate court has ordered a remand to determine whether any should be. *E.g.*, *FTC* v. *Grolier, Inc.*, 103 S. Ct. 2209 (1983); *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975).

eral questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' " 420 U.S. at 477-78 (footnote omitted), quoting in part *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945).[5]

3. Finally, this Court often has recognized that to be forced into expensive unjustified litigation to defend against punishment can itself be a denial of First Amendment rights. "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). It is already conceded by Appellant on the record that ill will and damage to reputation were absent here. R.T. 1318, 717, 1195-96. We here contend that the First and Fourteenth Amendments bar *any* award of punitive damages in *any* amount to a public figure when those elements concededly are not present. That straightforward issue is before this Court now. Where the constitutionally controlling facts—here, absence of ill will and of damage to reputation—are established, decision by this Court without further expense and delay is called for. *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 73-74 (1946).[6]

---

[5] This Court noted specifically that "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue . . . ." 420 U.S. at 483. See also, *e.g.*, *New York* v. *Cathedral Academy*, 434 U.S. 125, 128 n.4 (1977); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964); *Local No. 438, Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963). The posture of this case also parallels that of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), itself. There this Court after holding that the jury had been improperly instructed went on to conclude that the facts of record could not meet the constitutional test for damages. 376 U.S. at 284-85.

[6] Appellee's quotations out of context (Motion at 2, 22) from pleadings in a totally different case, referring to the uncertain

As the law now stands, some states hold that punitive damages may be imposed in public-figure libel cases even without ill will; other states hold that under the First Amendment punitive damages are barred in such cases entirely. The rule should not depend, as it now does, on the state in which suit is brought. The issue is properly here, and only this Court can resolve it.

III. THE CONSTITUTIONALITY OF THE CALIFORNIA STATUTES WAS PROPERLY CHALLENGED BELOW, AND THE OUTCOME IS CONTROLLED BY FEDERAL LAW.

In a number of broad-brush assertions, based on ignoring the record or supplementing it from imagination, Appellee now argues that the constitutionality of California Civil Code § 48a is not before this Court. The record demonstrates otherwise.

1. Appellee first ignores the fact that the arbitrary application of § 48a violates the First and Fourteenth Amendments, see *Police Dept.* v. *Mosley*, 408 U.S. 92 (1972), not just the equal-protection guarantees of the Fourteenth. The constitutionality under the First and Fourteenth Amendments of subjecting Appellant to damages in this case was challenged as early as the answer, C.T. 75, and thereafter. Also, § 48a is not the only stat-

---

amount of a punitive award, are inapposite, misleading, and apparently designed to confuse. Appellee fails to explain that *none* of those comments as to unripeness was describing *this* case at all. All the quoted matter had to do with defending a preemptive declaratory-judgment action brought by Appellant's insurance carrier seeking a judgment that it need not indemnify for punitive damages. The issue in that case depended upon whether damages had been determined. Appellant's position in that case has been that, *until this Court rules in the present case and determines whether punitive damages are awardable here at all*, there is no insurance claim pending and no basis for a determination whether there is liability to indemnify under California insurance law. In other words, the pendency of the present appeal challenging the very legality of punitive damages makes that indemnity litigation premature. That other litigation has nothing at all to do with the present issue in this case.

ute whose constitutionality was challenged here. The constitutionality as applied of California Civil Code § 3294, the punitive damage statute, was also challenged in the trial court and on appeal, C.T. 1757-58, as Appellee's Motion (at 26) recognizes.

With respect to § 48a, as soon as the trial court, reversing its earlier rulings, refused Appellant's proposed jury instructions that were based upon § 48a (at page *1141* of the transcript) it said, "And now I can listen to your speech." On page *1142* of the transcript, Appellant's counsel immediately challenged the statute as interpreted, as violating the constitutional guarantees of equal protection.[7] Later Appellant's counsel again urged the trial court that "Civil Code § 48a . . . would appear to be unconstitutional as a denial of equal protection of the law under both the United States and California Constitution," C. T. 1765, and referred to "the apparent constitutional infirmity of Section 48a," C. T. 1766. Thus the statute was challenged on Federal constitutional grounds in the trial court not once but *twice*,[8] as it continued to

---

[7] "Your Honor, I will say this briefly. We had requested that even in light of the court's ruling that defendant National Enquirer is a magazine, which we respectfully submit was erroneous, we are, nonetheless, even as a claimed magazine, entitled to the protection, benefit, classification, all privileges embodied in Civil Code section 48(a), because the limiting of whatever benefits to newspapers, radio, would be an arbitrary and unequal classification by the legislature, depriving a person in the position of the defendant of due process of law and denial of equal protection. And I submit it.

"THE COURT: All right. Thank you." R. T. 1142.

[8] As noted, the constitutional claim was raised practically in the same breath as the trial court's ruling. Moreover, all the California cases that Appellee cites, Motion at 9, as requiring claims to be raised early in the trial court, in fact hold nothing more than the commonplace rule that objections must be raised *sometime* in the trial court, rather than for the first time on appeal. *E.g.*, *Geftakys* v. *State Personnel Bd.*, 138 Cal. App. 3d 844, 864, 188 Cal. Rptr. 305, 317 (1982) ("The point . . . was not raised in the trial court"); *Bidart Bros.* v. *Elmo Farming Co.*, 35 Cal. App. 3d 248, 263, 110 Cal. Rptr. 819, 828 (1973) ("This was not urged at the trial level . . . ."); *Estate of Cran*[illegible], 73 Cal. App. 2d 93, 165 P.2d 940 (1946) (15-year

be on appeal.[9] No rule requires that constitutional objections must be raised three times in the trial court to be preserved. And there is not a word, not a hint, in the opinion to suggest that the court below considered any of the claims before it procedurally barred; instead, the opinion discusses the constitutional issues raised under the First Amendment throughout.[10]

2. Appellee argues that the retraction and apology published here could not possibly serve as a "correction" under § 48a, so that the exclusion of Appellant from that statute's protection can be ignored. (That, of course, would in no way affect this Court's jurisdiction over the punitive-damage issue, or the challenge to the constitutionality of § 3294 as applied.) With no record basis, Appellee asserts, Motion at 2, that Appellant was "found" not to have complied with § 48a—the very statute the courts below explicitly put aside and refused to apply at all. No such finding exists.

Appellee's argument that the correction can be ignored as insufficient contradicts Appellee's own prior position below: Appellee's counsel conceded to the trial court

---

delay). Moreover, whether a federal claim is seasonably raised is a federal question. *Street* v. *New York*, 394 U.S. 576, 583 (1969).

[9] "To construe § 48a to exclude periodicals like the National Enquirer . . . . would be an arbitrary and irrational distinction, based apparently on media content, which would violate the First and Fourteenth Amendments of the United States Constitution. . . ." Brief for Appellant, California Court of Appeal, at 43. "If Respondent's interpretation of § 48a were adopted, therefore, that statute would violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution . . . ." Reply Brief for Appellant, California Court of Appeal, at 7. The claim was also raised in the Supreme Court of California, which denied review. Appellant's Petition for Hearing, Supreme Court of California, at 12, 18-21.

[10] If there were any doubt as to whether the court below had considered the federal claims properly before it, the proper disposition of the appeal would be to vacate and remand for clarification of the point. *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194, 197 (1965).

that it was "clear" that "the sufficiency of any retraction is one for the jury," and "clear that a substantial issue of fact exists as to the sufficiency of the retraction." C.T. 111. That issue of fact was never addressed or resolved because, based on its holding that § 48a was inapplicable, R.T. 1028, the court never put the adequacy of the correction to satisfy § 48a to the jury, as it would have had to do if it had held § 48a applicable. *Behrendt* v. *Times-Mirror Co.*, 30 Cal. App. 2d 77, 85 P.2d 949 (1938).

The correction was brought to the jury's attention solely for consideration *only* in possible mitigation of damages. R.T. 1333-34, C.T. 1230.[11] In that same context of weighing possible mitigation of damages, in portions of their opinions clearly so labeled and limited, J.S. 25a, 56a, both courts below made disparaging comments about the correction—a correction which, we submit, was not only sufficient to be a retraction but indeed was abject and even coupled with an apology—a retraction far more generous and complete than most such found in the daily press.[12] Because the courts already had held § 48a inapplicable, neither the jury nor the courts ever measured it against the standards of § 48a, which calls simply for a "correction." Indeed, if the courts below had held such a

---

[11] "Any correction published by defendant *may be considered by you in mitigation of any damages* you decide plaintiff may be entitled to recover." R.T. 1333-34 (jury instruction) (emphasis supplied).

[12] The retraction, printed in bold-face type, read:

> **"An item in this column on March 2 erroneously reported that Carol Burnett had an argument with Henry Kissinger at a Washington restaurant and became boisterous, disturbing other guests. We understand these events did not occur and we are sorry for any embarrassment our report may have caused Miss Burnett."**

The original item contained 66 words; the retraction and apology contained 50 words. Appellee herself testified that the original story would have been acceptable had it described her behavior that evening as "effervescent" rather than "boisterous." R. T. 811.

retraction inadequate to qualify as a "correction" under § 48a, rather than merely ignoring it in mitigating damages, a separate First Amendment violation would have occurred because of the utter unsupportability of such a holding under prior California constructions of the correction statute.[13] But in fact, as the record makes clear, § 48a was held inapplicable and the adequacy of the correction under § 48a was an issue never reached and never passed upon. See *Time, Inc.* v. *Firestone*, 424 U.S. 448, 462-63 (1976).

IV. THE OPINION BELOW MAKES LEGAL RIGHTS TURN ON IMPRESSIONS OF CONTENT.

Appellee defends the judgment below by claiming that § 48a can constitutionally be limited to publishers of what courts consider "hot news." Motion at 19. That ignores, first of all, that the *Enquirer* like many other weeklies *does* have tight deadlines and *does* prepare "rush" stories—about twenty-five to thirty per week, according to the undisputed evidence. R.T. 1008. It also ignores the fact, clearly acknowledged by the trial court on the record, that the court amazingly based its ruling as to "hot news" on reading *four other* issues of the *Enquirer*, and did not examine the issue in which the news item complained of appeared. R.T. 935-36, 1018; C.T. 1573. Even beyond these failings, however, Appellee's rationale simply does not hold up legally.

---

[13] See, *e.g.*, *Behrendt* v. *Times-Mirror Co.*, *supra*; *DiGiorgio Corp.* v. *Valley Labor Citizen*, 260 Cal. App. 2d 268, 67 Cal. Rptr. 82 (1968); on which Appellant relied. A state could not redefine its requirements for statutory compliance so as to cut off rights reasonably relied and acted upon by a publisher. *Cf. Tornillo*, *supra*. *Barr* v. *City of Columbia*, 378 U.S. 146, 149-50 (1964); *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957). See also *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."); *Ward* v. *Board of County Commissioners*, 253 U.S. 17 (1920).

The California statute in terms and as applied up to now does *not* restrict its coverage to fast-breaking news. As interpreted, it covers *anything* that appears in whatever is held to be a "newspaper" or on radio or television—including book reviews, editorials, or daytime soap operas —but *nothing* that appears in the *National Enquirer*—even, as in this very case, a news item. What has happened here is that an entire publication has been banished from statutory protection based solely on subjective impression of the timeliness of *its content* (without any court's even considering the issue in which the article complained of appeared), and punished based on subjective evaluation of its worth.[14] J.A. 60a.

CONCLUSION

For the reasons stated here and in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

Of Counsel:

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

JOHN G. KESTER *
HAROLD UNGAR
Hill Building
Washington, D.C. 20006
(202) 331-3069
Attorneys for Appellant

February 9, 1984

---

[14] The Motion contains other incorrect statements. Twice at p. 23 it quotes Appellant as having stated that the courts below were "out to get it." The language Appellee quotes does not appear in the Jurisdictional Statement or anywhere else. The Motion states at p. 28 that the trial court "declined to grant Appellant's request for a stay;" Appellant has never had occasion to move for a stay, and *a fortiori* no such application has ever been denied. The Motion suggests, at p. 16, that denial of a hearing by the California Supreme Court constitutes review and approval. The contrary is settled law. "[W]e declare that our refusal to grant a hearing in a particular case is to be given *no weight* . . ." *People* v. *Triggs*, 8 Cal. 3d 884, 890, 506 P.2d 232, 236 (1973) (emphasis in original).